# BEFORE THE HEARING OFFICER OF THE TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF ARMANDO M. & ANTONIA G. CORDOBA; TO ASSESSMENT OF TAXES ISSUED UNDER LETTER ID NO. L2113066496

No. 06-06

## **DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on April 25, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Elizabeth K. Korsmo, Special Assistant Attorney General. Armando and Antonia Cordoba ("Taxpayers") represented themselves. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

#### FINDINGS OF FACT

- 1. In 2002, the Taxpayers filed timely federal and state personal income tax returns for the 2001 tax year.
- 2. In August 2003, the Internal Revenue Service ("IRS") notified the Taxpayers that they had made an error on their 2001 return and owed additional tax.
- 3. As soon as they received the notice, the Taxpayers went to H & R Block, where an employee named Mrs. Jaramillo prepared an amended 2001 federal tax return for the Taxpayers.
- 4. Mrs. Jaramillo advised the Taxpayers that they also had to amend their 2001 New Mexico tax return. In order to avoid additional expense, she suggested that the Taxpayers contact the Department directly to obtain the forms and information they needed.

- 5. That same afternoon, Mr. Cordoba called the Department's Albuquerque district office. He told the employee who answered the telephone that he had received a notice from the IRS concerning his 2001 taxes and needed to file an amended return.
- 6. Mr. Cordoba does not know the name of the employee he spoke with, but testified that she told him the IRS notice was a federal matter and had nothing to do with the state.
- 7. Mr. Cordoba understood this to mean that he did not have to amend his 2001 New Mexico income tax return.
- 8. In 2005, the Department received information from the IRS concerning the income reported on the Taxpayers' 2001 amended federal income tax return. When this information was compared to the income reported on the Taxpayer's New Mexico return, the Department determined that additional tax was due.
- 9. In August 2005, the Department assessed the Taxpayers for \$948.00 of additional tax due as a result of the error they made on their 2001 income tax return, plus interest of \$441.15. No penalty was assessed.
  - 10. The Taxpayers immediately paid the \$948.00 of tax principal.
- 11. On August 11, 2005, the Taxpayers filed a written protest to the assessment of interest.

## **DISCUSSION**

The issue to be decided is whether the Taxpayers are liable for the interest that accrued on their underpayment of 2001 New Mexico income taxes between August 2003, when Mr.

Cordoba called the Department for advice concerning his 2001 return, and August 2005, when the Taxpayers received and paid the Department's assessment of additional tax due. The

Taxpayers believe they should be excused from the payment of interest because Mr. Cordoba was given incorrect advice concerning the Taxpayers' obligation to amend their 2001 state income tax return. The Department maintains that New Mexico's tax laws provided the Taxpayers with notice of their legal obligation to file an amended return, and that interest is due from the original due date of the tax to the date it was paid.

**Burden of Proof**. NMSA 1978, § 7-1-17(C) provides that any assessment of tax by the Department is presumed to be correct. NMSA 1978, § 7-1-3 defines tax to include not only the amount of tax principal imposed but also, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." *See also, El Centro Villa Nursing Center v.*Taxation and Revenue Department, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Accordingly, the assessment issued to the Taxpayers is presumed to be correct, and it is the Taxpayers' burden to present evidence and legal argument to show that they are entitled to an abatement.

**Imposition of Interest**. NMSA 1978, § 7-1-67 governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). With limited exceptions that do not apply here, the New Mexico Legislature has directed the Department to assess interest whenever taxes are not timely paid.

The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. In this case, the IRS determined that the Taxpayers made a mistake when calculating their 2001 income taxes. Although the Taxpayers acted in good faith and without any intent to defraud the government, the fact remains that the State of New Mexico would have received an additional \$948.00 tax payment if the Taxpayers had completed their return correctly. As a result of the Taxpayers' mistake, the state was deprived of the use of this money for the period between April 2002, the original due date of the Taxpayer's return, and August 2005, the date payment of the additional tax was made. For this reason, interest was properly assessed pursuant to NMSA 1978, § 7-1-67(A).

**Estoppel**. The Taxpayers maintain that they should not be required to pay the interest that accrued on their unpaid taxes after the date that Mr. Cordoba called the Department and was told that the notice he received from the IRS had nothing to do with the state. In effect, the Taxpayers are raising an estoppel issue, arguing that the Department should be estopped from enforcing the collection of interest that would otherwise be due.

Estoppel is rarely applied against the state, and then only in exceptional circumstances where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State of New Mexico, Human Services Department*, 1998-NMSC-11, ¶17, 125 N.M. 140, 958 P.2d 98. In determining whether estoppel is appropriate, the conduct of both parties must be considered. *Gonzales v. Public Employees Retirement Board*, 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App.), *cert. denied*, 114 N.M. 227, 836 P.2d 1248 (1992). The following elements must be shown as to the party to be estopped (*i.e.*, the Department): (1) conduct that amounts to a false representation or concealment of material facts, (2) actual or

constructive knowledge of the true facts, and (3) an intention or expectation that the other party will act on the representations. As to the party claiming estoppel (*i.e.*, the Taxpayer), the following must be shown: (1) lack of knowledge of the true facts, (2) detrimental reliance on the adverse party's representations or concealment of facts, and (3) that such reliance was reasonable. *Id. See also, Johnson & Johnson v. Taxation and Revenue Department*, 123 N.M. 190, 195, 936 N.M. 872, 877 (Ct. App.), *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997).

The facts presented in this case do not support a finding of estoppel. Here, an employee of H & R Block advised the Taxpayers that as a result of the adjustment made to their federal return, they had to file an amended New Mexico income tax return for 2001. Mr. Cordoba then called the Department's Albuquerque office and spoke to an unidentified Department employee. He told the employee that he had received a notice from the IRS and needed to file an amended return. The employee told Mr. Cordoba that the IRS notice was a federal matter and had nothing to do with the state. Based on this response, the Taxpayers took no action to amend their 2001 state tax return.

Mr. Cordoba's testimony indicates that he was misled by the information he received from the Department. This was certainly unfortunate, and the Department should make every effort to insure that its employees are trained to give proper attention and advice to taxpayers who call the Department for information. Nonetheless, the fact that a taxpayer receives incorrect advice does not provide a legal basis for barring the collection of taxes and interest otherwise due to the state. Estoppel based on the oral advice of an unidentified employee is particularly problematic because there is no way to confirm exactly what information the employee was given or what questions were asked. It is not clear, for example, whether the employee with whom Mr.

Cordoba spoke understood that he was asking about an amendment to his state return rather than his federal return. Although the Department employee could have asked additional questions concerning the nature of the IRS notice, there is no evidence that she acted fraudulently or intended to induce the Taxpayers not to pay taxes the employee knew were owed to the state.

Turning to the other side of the equation, the Taxpayers had access to information that should have put them on notice that an amended return was required. NMSA 1978, § 7-1-13(C) clearly states that if any adjustment is made to a taxpayer's federal tax return, "the taxpayer shall, within ninety days...file an amended return with the department." In addition, the Taxpayers were specifically advised of the need to amend their New Mexico return by an employee of H & R Block. After receiving what seemed to be conflicting advice from the Department, the Taxpayers should have made additional inquiries, either by asking to speak with a higher-level Department employee or by going back to H & R Block to clarify their state tax obligations.

New Mexico has a self-reporting tax system and taxpayers have a statutory obligation to determine their tax liabilities and accurately report and pay those liabilities to the state. *See*, NMSA 1978, § 7-1-13. While the Department makes every effort to give correct advice to taxpayers who contact the Department, the ultimate responsibility for payment of tax remains with the taxpayer. Taxpayers are not entitled to rely on the oral advice of a Department employee as a substitute for making their own independent review of the statutes and regulations. *See*, *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989) (a taxpayer's reliance on the oral representations of a Department employee was not reasonable).

# **CONCLUSIONS OF LAW**

- The Taxpayers filed a timely protest to the assessment of interest issued under Letter
   ID L2113066496, and jurisdiction lies over the parties and the subject matter of these protests.
- 2. The Taxpayers' error in completing their 2001 federal income tax return resulted in the late payment of \$948.00 of New Mexico income tax, and interest was properly assessed on this amount from the date the tax was originally due until the date it was paid.
- 3. The Department is not estopped from enforcing its assessment of interest against the Taxpayers.

For the foregoing reasons, the Taxpayers' protest IS DENIED.

Dated May 1, 2006.